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No. 91-7358

In The
Supreme Court of the United States
October Term, 1992

TODD A. BRECHT,

Petitioner,

v.

GORDON A. ABRAHAMSON, SUPERINTENDENT, DODGE CORRECTIONAL INSTITUTION,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the habeas statute, 28 U.S.C. § 2254, require the federal court to grant habeas relief if the state cannot prove that the prosecutor's use of the defendant's post-*Miranda* silence to impeach his trial testimony (a *Doyle* violation) was harmless beyond a reasonable doubt?

2. Is the standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the state to prove the error was harmless beyond a reasonable doubt, the proper standard to review a *Doyle* violation on federal habeas corpus review?

3. If the *Chapman* standard is not the correct standard for review of a *Doyle* violation on federal habeas corpus review, what is the correct standard?

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On Writ Of Certiorari
To The United States Court of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

STATUTORY PROVISION INVOLVED

(in addition to those set forth in petitioner's brief)

§ 2254 State custody; remedies in Federal courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a

State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Summary of holdings of lower courts.

Each of the previous courts reviewing this case has held that the prosecutor violated *Doyle v. Ohio*, 426 U.S. 610 (1976), by referring to Brecht's post-*Miranda*[1] silence in two questions on cross-examination and in comments during closing argument. But each court in turn reached the opposite conclusion of its predecessor on the question of whether the error was harmless. Applying *Chapman v. California*, 386 U.S. 18 (1967), the Wisconsin Court of Appeals held the error was not harmless beyond a reasonable doubt and reversed the conviction (J.A. 49). The Wisconsin Supreme Court reinstated the conviction, holding the error was harmless beyond a reasonable doubt in light of the infrequency of the error, the permissible evidence that the defendant fled without seeking help for the victim, the permissible evidence of his pre-*Miranda* silence which was much more damaging to his credibility than his post-*Miranda* silence, and the strong circumstantial evidence of guilt (J.A. 66-68, 73). The federal district court held the error was not harmless beyond a reasonable doubt because the untainted evidence was not overwhelming (J.A. 91-93). The United States Court of Appeals for the Seventh Circuit reversed the district court, holding that the *Chapman* standard is not the appropriate standard for habeas review of a *Doyle* violation. Applying the less stringent standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), and *United States v. Lane*, 474 U.S. 438 (1986), the court held the error harmless (J.A. 116-28).

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

The proper standard of review of a *Doyle* error on federal habeas corpus brings the case to this Court (J.A. 148).[2]

Summary of relevant trial facts.

On October 12, 1985, Molly Hartman and her husband, Roger, then district attorney of Buffalo County, Wisconsin, drove to Georgia to secure the release of Molly's younger brother, Todd Brecht, from prison (Tr. 390-91; J.A. 51, 76). Brecht had been convicted of felony theft. By paying his $3,750 restitution, the Hartmans were able to get Brecht released and placed on probation and to have his probation transferred to Wisconsin (Tr. 391; J.A. 51, 76). The Hartmans brought Brecht to their home in Alma, Wisconsin, where he was to stay for a short period awaiting an opening in a halfway house (Tr. 392; J.A. 51, 76). The Hartmans were both recovering alcoholics (Tr. 393-94). Brecht was also an alcoholic and had been getting into trouble with the law (Tr. 387). He had previously discussed his homosexuality with the Hartmans (Tr. 392). As a rule of staying in their home, the Hartmans told Brecht that he could not drink alcohol or engage in homosexual activity in the Alma area (Tr. 392; J.A. 51, 76). In the past, they had refused to allow him to bring his homosexual friend to their home (Tr. 400). Roger had a difficult time understanding male homosexuality or

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[2]In the lower courts, Brecht claimed that the use of *all* of his pretrial silence and conduct was error. The Wisconsin Supreme Court and both federal courts upheld the use of all of Brecht's pre-*Miranda* silence and conduct. Brecht did not challenge those rulings in his petition for certiorari or in his brief in this Court and thus they are not before the Court. Brecht did challenge the Seventh Circuit's rulings on two evidentiary issues. This Court denied certiorari on those issues. Therefore, the state has not included the facts relating to those issues except to the extent necessary to place the relevant evidence in context and to explain the *Doyle* violations that are before the Court.

accepting a homosexual brother-in-law (Tr. 393). It was also a condition of Brecht's probation that he was not to violate the law, become intoxicated, or leave the state without permission (J.A. 51).

In the few days between Brecht's arrival and the shooting, the Hartmans took Brecht to Eau Claire to find out about the halfway house, bought him clothes, took him to an A.A. meeting, and loaned him one of their cars so he could go to Eau Claire to meet with his probation agent (Tr. 394-95, 424-26). Brecht never really expressed any appreciation for what the Hartmans were doing for him (Tr. 421).

On the day of the shooting, October 17, 1985, Roger and Molly Hartman each went to work in the morning (Tr. 402, 138). About 5:30 p.m. on October 17, Roger Hartman left his office, which was about five to ten minutes away from his home (Tr. 138-39). About 5:45 p.m., his neighbors, Grant and Charlotte Seitz, heard their doorbell ringing frantically. They opened the door and Roger came in. He collapsed, saying he had been shot with a .22 by Todd Brecht and telling them to call an ambulance and the sheriff (Tr. 150-51, 164). When Mrs. Seitz told him she had just seen Molly come home, Roger responded, "Oh my God, don't let her go in that house, don't let her near that house" (Tr. 166). He said, "[h]e's down there in the house in the basement" (Tr. 153). Roger told Mrs. Seitz that he had sneaked out the basement door and crawled on his knees to get to her house (Tr. 167). When Grant started to go to the Hartmans to get Molly, Roger told her, "[d]on't let Grant go down there" (Tr. 169). Later at the hospital, Roger told the emergency medical technician to tell the police to find Molly and make sure she didn't go near Brecht (Tr. 190). He told police that Brecht took Molly's car and that he was on probation (Tr. 219).

While searching the Hartman home, police found a spent .22 bullet lying on the floor of the lower level of the

home and an empty .22 casing toward the opposite end of the hallway; a bolt action, semi-automatic .22 rifle was on the patio outside the family room with a live round of ammunition jammed in the chamber; an empty gun case was found upstairs in the room Brecht had been using and two ammunition boxes with .22 ammunition were found under the covers of his bed (Tr. 222-26, 263-64, 299, 300). Empty beer cans were found in the house and a soda can with a bullet hole in it and a spent .22 casing were found in the backyard (Tr. 265, 272, 274-75). The receiver was next to the telephone in the master bedroom, making the other phone in the house inoperable (Tr. 222, 255-56). The hallway area was covered with tightly stretched carpet and there was nothing there which would cause anyone to trip (Tr. 259-60; *see also* J.A. 52-53). Later, a block of knives which Molly always kept on the kitchen counter was found in a cabinet under the sink (Tr. 408-09).

As he was fleeing the area, Brecht ran the car into a ditch (Tr. 318-19). A police officer, Zeller, stopped to offer Brecht assistance, but Brecht told him his sister would call a wrecker (Tr. 332; J.A. 53). He then went to a local residence, and the resident (Schlesselman) gave him a ride to Winona, Minnesota (Tr. 344-47; J.A. 53, 77). Brecht said nothing to either Zeller or Schlesselman about the shooting incident; he did not mention Hartman or request that they call the police or an ambulance (Tr. 349; J.A. 53, 77).

A short time later, the local police approached Brecht in Winona. He lied about his identity and where he was from. He was taken into custody based on the Wisconsin shooting incident (Tr. 356-58; J.A. 53, 77). He told the arresting officer, Papke, that it was a big mistake and he wanted to talk to someone who would understand him, but he did not tell Papke the shooting was an accident and he did not explain what was a big mistake (Tr. 363-64; J.A. 53, 77-78). When the defendant was searched, the police found fourteen rounds of .22 long rifle ammunition in his

pocket (Tr. 361). The arresting officer testified that defendant was not given his *Miranda* rights; they were merely holding him for the Wisconsin authorities (Tr. 366–67; J.A. 53, 78). Later a Buffalo County officer served defendant with an arrest warrant while defendant was in the Winona holding cell, but he did not give him his rights (Tr. 303). The record indicates Brecht was first given his *Miranda* rights at his initial appearance in court (J.A. 53, 78). Brecht never testified that he was given his rights by anyone at an earlier time.

The State also elicited evidence that Roger was six feet tall and the path of the bullet through his body was essentially horizontal, slightly downward (Tr. 554). It entered through his back and exited through his chest. Roger died later as a result of complications from the wound. The murder weapon had a normal trigger pull and it would not fire unless the trigger was pulled. It was semi-automatic, requiring a separate pull to fire each bullet (Tr. 479–96).

After the State had presented its case, Brecht testified. He testified that on the day of the shooting, he drank beer and some liquor (Tr. 581). He loaded the rifle and shot at cans (Tr. 582). When he saw Roger drive up, he wanted to hide the gun because he did not have permission to use it and he wanted to hide the beer cans because he knew Roger would be disappointed in him for drinking (Tr. 586). He didn't remember the gun was loaded, he stumbled, and the gun went off. When he realized Roger was gone, he went to look for him, still holding the gun. He was so upset that he was going to shoot himself, but he couldn't get the gun reloaded so he threw it down. Then he decided to take Roger's car to look for him. He saw Roger standing at the neighbor's door, so he knew he was getting help. He was on probation and just wanted to get away; he didn't know how badly Roger was hurt; he just took off until he ran the car into the ditch (Tr. 587–96). He testified that he did not intend to shoot Roger; he had no reason to hurt

him or Molly; it was an accident (Tr. 602; *see also* J.A. 52, 76–77).

On cross-examination, the State elicited Brecht's admission that he often lies (Tr. 605, 611). He testified that his plan was to stay in Wisconsin, work, not drink, and change his sexual preference (Tr. 616, 617). The prosecutor impeached this testimony with letters Brecht had written, with homosexual overtones, to a jail inmate friend in Georgia, in which Brecht indicated he would do anything for his friend and would get the money to bail his friend out, even if it was $50,000 (Tr. 621–22; J.A. 71). This suggested Brecht's real plan was to leave Wisconsin in violation of his probation and help his friend, which provided one possible motive for the crime (J.A. 71). On the morning of the murder he had called the Georgia jail to find out the bail amount and told the jailer to tell his friend to hold on, he would be coming up with the bail money soon (Tr. 630). Brecht was cross-examined on why he had to come in behind Roger to sneak up the stairs to put the gun away when he could have hidden it in any number of easier places; why he didn't put the gun down as soon as the accident occurred; why he got in the car to look for Roger instead of searching the grounds around the house for him and why he didn't seek assistance to call for an ambulance or tell the first citizens and officer at the ditch about the accident (Tr. 652–76).

The only questions on cross-examination which were held by the Wisconsin Supreme Court and the federal courts to violate *Doyle* are the following two questions: "In fact the first time you have ever told this story is when you testified here today was it not?" (Tr. 681; J.A. 64, 81) and, on redirect, "Did you tell anyone about what had happened in Alma?" (Tr. 720; J.A. 65, 81).

The defense called a jailer who testified he overheard Brecht say on the telephone that he didn't mean to shoot or kill anybody or for anybody to get murdered. Then,

Brecht said, "I can't talk now, there's [sic] cops in the room" (Tr. 727).

The following comments were held to be impermissible comments on post-*Miranda* silence (impermissible portion italicized): "however the problems with motive are simply that they are inside the actor's head and there is no way we can look inside of that actor's head *and remember that Mr. Brecht never volunteered until in this courtroom what happened in the Hartman residence*, and there aren't any CAT scans like we use for gall bladders or kidney stones or lungs to look inside of somebody's head to find out motive" (Tr. 793; J.A. 65, 82), and, "What is a lie, let's talk about the anatomy of a lie. One thing a person can do when there are certain physical facts, they can come in and deny them or when they're overwhelming you carefully tailor your story to fit with the facts as known to the State, or to anybody else for that matter, but you just give a different interpretation to it and that's specifically what this defendant did. Remember *he made no statements to the law enforcement officers*, James Zeller or the Winona Police. *He sits back here and sees all of our evidence go in and then he comes out with this crazy story*"[3] (Tr. 801; J.A. 65, 82).

On closing argument, defense counsel stated, "Now what would you do, and use your common sense, if somebody handed you a piece of paper, and you're sitting in a police station and it says attempted murder on it, and the State is making a big deal about him using the word murder, I know what I would do, I would call somebody that I knew and I would say, 'I didn't murder anybody'" (Tr. 873).

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[3]Only the district court found the phrase "he made no statements to the law enforcement officers" to be error. The Wisconsin Supreme Court and Seventh Circuit presumably realized it was limited by the qualifying phrase that immediately followed, "James Zeller or the Winona police," making it a permissible pre-*Miranda* reference.

In rebuttal closing, the prosecutor made the following statement, which the Wisconsin Supreme Court and federal courts held to be an impermissible use of post-*Miranda* silence: "Mr. Ridgeway [defense counsel] said, 'what would you say?' *I know what I'd say, I'd say 'hold on, this was a mistake, this was an accident, let me tell you what happened,' but he didn't say that did he. No, he waited until he hears our story*" (Tr. 888; J.A. 65, 82).

The jury, which was from a different county pursuant to a change of venue, was instructed on both first-degree murder (causing the death of a human being with intent to kill that person or another) and homicide by negligent use of a weapon (J.A. 24-28). The jury returned a verdict of first-degree murder.

SUMMARY OF ARGUMENT

First, the State assumes a *Doyle* violation entitles a state criminal defendant to reversal of his conviction on direct review unless the state proves the federal constitutional error harmless beyond a reasonable doubt under *Chapman*. The question is whether the same standard applies on habeas review. The Court must look first to the habeas statute. Congress has provided habeas review only for those state prisoners who are in custody in violation of the Constitution. Congress has not defined what it means to be in custody in violation of the Constitution, but has left it for this Court to define, just as it has let it define the scope of habeas review in other contexts. In formulating that definition, this Court must look to the concept of federalism implicit in our system of government and to the core purpose of habeas review, which is to provide relief from "the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable." *Fay v. Noia*, 372 U.S. 391, 414 (1963).

If the habeas petitioner need only prove a federal constitutional violation to shift the burden to the state to prove the error harmless beyond a reasonable doubt, then habeas review is nothing more than another direct appeal, this time before a federal tribunal and perhaps years after conviction. Habeas review is not intended to be simply another round of direct review. Habeas review is inherently different from direct review; it is an extraordinary collateral attack on a final and presumptively valid state judgment. Accordingly, it should be governed by a different standard. It is inconsistent with the concept of federalism, the core purpose of habeas corpus and the nature of collateral review to require the state to shoulder the same heavy burden to prove a constitutional error harmless on habeas review that it bears on direct review.

A criminal defendant has no constitutional right to have the state prove a constitutional error at his trial was harmless beyond a reasonable doubt. While *Chapman* serves to remedy a federal constitutional error in a particular case, it also functions to deter such violations by placing a heavy burden on the state to show why a particular violation should not warrant relief on direct review. The prospect of further review by a federal court on a habeas petition likewise encourages state actors to operate in accord with the federal Constitution. It does not follow, however, that state actors will be any less deterred from violating federal constitutional rights if the test for harmless error which is applied on direct review in state court is not applied on habeas review in federal court.

Meanwhile, the costs to the criminal justice system from having identical standards of harmless error for each type of review would be prohibitive. This Court has reached the same conclusion in limiting habeas review of allegations of Fourth Amendment violations and in declining to apply new constitutional rules of criminal procedure retroactively on habeas review. The costs of applying the *Chapman* test

on habeas review of a *Doyle* violation are particularly troubling because of the nature of the violation. The *Doyle* rule prohibits the state from breaching an implied promise to the accused that his silence will not be used against him. Like the Fourth Amendment exclusionary rule, it limits what the government can do with evidence, no matter how probative the evidence is.

Moreover, neither due process nor the Sixth Amendment right to a jury trial requires extending the *Chapman* test to habeas review. Although the *Chapman* test is intended in part to accommodate the goal of having a jury determine guilt or innocence on the basis of a proper record, this goal is not diminished by applying a less stringent test than *Chapman* on habeas review.

The federal courts serve as guardians of federal constitutional rights by determining *de novo* on habeas review whether a federal constitutional error has occurred during the state criminal proceedings. Like a finding of federal constitutional error by a state court on direct review, a finding of federal constitutional error by a federal court on habeas review does not mean the state prisoner is entitled to relief. On direct review, relief is warranted if the state cannot show that the federal constitutional error was harmless beyond a reasonable doubt. On habeas review, however, relief is warranted only if the state prisoner is "in custody in violation of the Constitution." Even though federal constitutional error may not be harmless beyond a reasonable doubt, the state prisoner nonetheless may be in custody in accord with the federal Constitution. A state prisoner is "in custody in violation of the Constitution" only where there has been such an extreme malfunction of the state criminal justice system as to render the custody "constitutionally intolerable."

For all of these reasons, the *Chapman* test of harmless error is not a proper yardstick by which to measure

whether there has been an extreme malfunction of the state process warranting habeas relief.

The State respectfully offers alternative harmless error tests that are better suited than *Chapman* to ensure meaningful habeas review without unduly derogating the concept of federalism or the core purpose of habeas corpus. As one option, this Court could require the state to prove the constitutional error harmless, but impose the lesser burden of the *Kotteakos/Lane* standard as the Court of Appeals has already done in this case.

As a second option, this Court could hold that habeas relief is not warranted because the prisoner is not in custody in violation of the Constitution if, in spite of the constitutional error, the state can show a constitutionally sufficient basis for the custody. If the habeas court finds constitutional error, it would then review the untainted evidence to determine if it is sufficient to support the verdict under the sufficiency standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979). If the untainted evidence is sufficient to support the guilty verdict beyond a reasonable doubt, habeas relief must be denied. As an added protection in those cases where the state court found constitutional error but held it to be harmless under *Chapman*, the habeas court would also review that determination. Under a modification of Justice Harlan's approach in his *Chapman* dissent, the habeas court would review the state court's application of *Chapman* to make sure that *Chapman* was not applied arbitrarily or unreasonably, "manifesting a purpose to defeat federal constitutional rights." *Chapman*, 386 U.S. at 56 (Harlan, J., dissenting).

Both the *Kotteakos/Lane* option and the *Jackson v. Virginia*/Harlan option accommodate the valued differences between direct review and collateral review, the imperative of federalism, the goal of finality necessary to an effective criminal justice system, and the protection of the

constitutional rights of individual citizens. Adoption of the State's proposal would limit habeas relief to those cases in which custody is constitutionally intolerable because the state has no valid basis for imposing restraint on liberty.

Approaching the question in yet a different way, this Court could treat *Doyle* violations as it has treated other forms of prosecutorial misconduct and attorney error. Under this approach, a *Doyle* violation would not rise to the level of a federal constitutional violation at all unless it so infected the trial with unfairness that the resulting conviction is a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). A fair trial is one which can be relied on as having produced a reliable result. To obtain relief on habeas, the prisoner would have to show a reasonable probability that, but for the *Doyle* violation, the result would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

ARGUMENT

I. THE *CHAPMAN* "BEYOND A REASONABLE DOUBT" HARMLESS ERROR TEST SHOULD NOT BE APPLIED ON HABEAS CORPUS REVIEW OF *DOYLE* ERRORS.

A. Introduction.

The State's first argument is that although *Chapman* is the correct standard for review of a *Doyle* violation on direct review, it is not the proper standard for determining when a *Doyle* violation should result in the granting of federal habeas corpus relief.

The State will support this argument by the language of the habeas statute, the core purpose of habeas, the imperative of federalism, the nature of collateral relief,

which is inherently different from direct review, the remedial nature of the harmless error doctrine, and the nature of a *Doyle* violation.

The State will show that application of *Chapman* on habeas is not necessary to ensure the full protection of constitutional rights by the states or to allow the federal courts to fulfill their proper role in the protection of constitutional rights. Refusal to apply *Chapman* on habeas is not inconsistent with due process or the Sixth Amendment right to jury trial.

Finally, the State will discuss alternative harmless error tests and will suggest a proposal for review of *Doyle* errors on habeas that limits habeas corpus to its core purpose, that does not skew the delicate balance of state and federal control of prosecution and punishment of crime, and that is fully consistent with Congressional policy by protecting state prisoners in custody in violation of the Constitution.

Alternatively, the State will argue that a *Doyle* violation, like other forms of prosecutorial misconduct, does not even rise to the level of a due process violation unless by itself it so infected the trial with unfairness that it made the resulting conviction a denial of due process. A defendant cannot show such a denial unless he can show a reasonable probability that, but for the error, the result of the proceeding would have been different.

B. Congress Has Granted The Federal Courts Narrow Authority To Provide Relief Only To State Prisoners Who Are In Custody In Violation Of The Constitution, Leaving It To This Court To Define When A Person Is In Custody In Violation Of The Constitution.

Section 28 U.S.C. 2254(a) provides: "The Supreme Court, a Justice thereof, a circuit judge, or a district court

shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

The statute does not define when habeas relief shall be granted.[4] The only clue is the language in § 2254(a) that the court shall entertain an application of a person in state custody on the ground he is "in custody in violation of the Constitution."[5] Based on this language, and the lack of any other language relating to the granting of habeas relief, the logical conclusion is that Congress has authorized the federal courts to grant habeas relief only to those persons who are in state custody in violation of the Constitution.

Petitioner and his amicus contend that relief on habeas must be granted whenever the state cannot meet the stringent standard of *Chapman*. They note that this Court at times has assumed that *Chapman* applies on habeas and that Congress has failed to adopt various proposals to limit habeas review. Neither factor is persuasive.

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[4]Section 28 U.S.C. 2241 grants the Justices of this Court and the lower federal courts the authority to grant writs of habeas corpus. Section 28 U.S.C. 2243 provides that the court shall "dispose of the matter as law and justice require." Sections 28 U.S.C. 2242-2253, 2254(b)-(f) and Rules 1-11, following 28 U.S.C. 2254, set forth various procedural rules governing the writ procedure. None of these provisions define when relief shall be granted.

[5]Because this case and most habeas cases allege custody in violation of the Constitution rather than in violation of laws or treaties of the United States, the State will confine its argument to that term.

This Court's assumption without discussion that the *Chapman* test does apply on habeas does not preclude it from considering and deciding whether that test *should* apply on habeas. In the cases petitioner and amicus cite, it appears the parties did not argue, and the Court did not consider, whether the *Chapman* standard should apply on habeas review. The question was raised, but not reached, in *Greer v. Miller*, 483 U.S. 756 (1987).

In *Teague v. Lane*, 489 U.S. 288 (1989), this Court did not hesitate to decide whether new constitutional rules of criminal procedure should apply retroactively on habeas just because it had failed to address that significant issue in prior cases. So, too, it should not hesitate to decide whether *Chapman* should apply on habeas review just because it has assumed so, without addressing the question, in previous cases. As Justice Frankfurter once said, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." *Henslee v. Union Planters Nat. Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting), *quoted in Rose v. Mitchell*, 443 U.S. 545, 575 n.1 (1979) (Stewart, J., concurring).

Congress has not defined what it means to be "in custody in violation of the Constitution." Nor has Congress spoken to the questions of whether the harmless error doctrine applies on habeas review or, if it does apply, what form it should take. Thus, it is for this Court to give substance to the term "in custody in violation of the Constitution." It is for this Court to determine whether the harmless error doctrine applies on habeas review and, if so, what form it should take. *See generally McCleskey v. Zant*, 111 S. Ct. 1454, 1465 (1991) (Congress's silence on standard of abuse of habeas writ was not intended to foreclose judicial application of principles developed in prior cases); *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 446 (1987) (Court has duty to fill in gaps left by Congress); *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (courts may

establish modes of procedure when habeas statute silent on point).

The Court's role here is entirely consistent with the role it has taken in previous habeas cases. It has given substance to the "exhaustion of state remedies" requirement, it has defined the showing of "cause and prejudice" necessary to overcome a state procedural default, and it has mandated that new rules of criminal procedure will not be applied retroactively to cases on collateral habeas review. *See Rose v. Lundy*, 455 U.S. 509 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Murray v. Carrier*, 477 U.S. 478 (1986); *Teague v. Lane*, 489 U.S. 288. This Court has demonstrated an "historic willingness to overturn or modify its earlier views of the scope of the writ, even where the statutory language authorizing judicial action has remained unchanged." *Wainwright v. Sykes*, 433 U.S. at 81. Congress has not indicated that it disapproves of the Court's role in defining the scope of the writ and in resolving issues which Congress has not addressed. This Court should have no qualms, therefore, about speaking to an issue, such as the standard for granting relief and the applicability of harmless error, on which Congress has not spoken.

This Court need not stay its hand simply because over the years Congress has declined to pass various legislative proposals which would impact on when habeas relief would be granted. Legislative inaction is a "weak reed upon which to lean" and it provides a "poor beacon to follow" to determine legislative intent. Singer, *Sutherland Statutory Construction*, 49.10, at 76 (5th ed. 1992); *Zuber v. Allen*, 396 U.S. 168, 185 (1969). *See also Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942). This Court has said that it is generally "reluctant to draw inferences from Congress's failure to act." *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). The Court's reticence to rely on unpassed amendments that were proposed contemporaneously with the legislation at issue is even

more justified in regard to non-contemporaneous legislative proposals that were not passed. The multitude of reasons for non-passage of any particular proposal or package robs it of probative value. The Congressional records relied on by Brecht are particularly unilluminating of Congress's intent regarding whether *Chapman* should be applied on habeas review of *Doyle* errors. The quoted portion of Senator Heyburn's speech was in response to the directed verdict proposal that accompanied the harmless error test; President Taft's proposal did, in fact, focus on the outcome of the trial; and the debates addressing whether *Chapman* should be applied to coerced confessions never considered whether *Chapman* itself was a correct standard on habeas review. Reform measures which would have precluded the habeas court from hearing claims if the state courts had fully and fairly litigated those claims focused on non-reviewability, not the appropriate standard of review. If the Court is to rely on Congress's failure to pass certain proposals to discern the intent behind the legislation that was passed, it should do so only where the particular issue before the Court was specifically addressed and the reason for non-passage is clear. That is not the case here.

Until and unless Congress defines its terms in the habeas statute or sets forth a standard of habeas relief, the task is necessarily left to this Court, which must decide those cases that come before it and give guidance to the lower federal courts in applying the habeas statute. That this Court has historically given substance to the scope of habeas corpus and that Congress has not intervened indicates that the role played by this Court to date is consistent with Congressional policy and is what Congress intended.

The crux of the question before the Court, then, is whether habeas relief must be granted because a person is in custody "in violation of the Constitution" within the meaning of 28 U.S.C. § 2254 whenever a *Doyle* violation

has occurred during his state court proceedings which the state has been unable to prove harmless beyond a reasonable doubt under the *Chapman* test.

C. The Two Overriding Principles That Govern Habeas Jurisprudence, The Imperative Of Federalism And An Adherence To The Core Purpose Of Habeas Corpus, Dictate That The *Chapman* Test Should Not Apply On Habeas Corpus.

As it has always done, this Court will find the roots for a proper interpretation of the habeas statute in two overriding principles: adherence to the core purpose of habeas corpus and concern for the delicate balance of state and federal control in the prosecution and punishment of state crimes. It is not surprising that the development of the jurisprudence of habeas corpus has not been smooth in light of the variety of questions this Court has been called upon to address, each arising in a unique factual setting at a distinct time in history. *See Fay v. Noia*, 372 U.S. 391, 412 (1963). But what is remarkable, and compelling, is the consistency with which this Court has remained true to two overriding themes in constructing a principled habeas jurisprudence: the core purpose of habeas corpus and the delicate balance a dual federal-state system demands. Contrary to the claims of some critics, this Court has never lost sight of the unique role that habeas plays in permitting a federal court to ignore the usual constraints of finality and *res judicata* to provide relief in those exceptional cases where the state criminal process has been so fundamentally defective that the resulting confinement of an individual is constitutionally intolerable in our civilized society.

Perhaps most illuminating are those opinions of the Court which have been perceived by some as greatly expanding or liberalizing the scope of the writ of habeas

corpus. For even in those opinions, this Court did not neglect either the core purpose of habeas corpus or the imperative of federalism.

In *Brown v. Allen*, 344 U.S. 443, 465 (1953), the lead opinion recognized that both the state and federal courts have a duty to protect persons from violations of their constitutional rights. The oft-cited opinion of Justice Frankfurter, which had the approval of a majority of the Court, asserted that most claims of violations of federal constitutional rights are presumably dealt with adequately in the state courts. A wholesale opening of state prison doors by federal courts would be in disregard of the duty of federal courts to "support and not weaken the sturdy enforcement of their criminal laws by the States." *Brown v. Allen*, 344 U.S. at 497-98 (Frankfurter, J., separate opinion). Justice Frankfurter emphasized the duty of the Court to "give fair effect to the habeas corpus jurisdiction as enacted by Congress" in a way which accommodates "the complexities of our federalism and the workings of a scheme of government involving the interplay of two governments, one of which is subject to limitations enforceable by the other." *Brown v. Allen*, 344 U.S. at 498-500. Justice Frankfurter recognized that it is primarily the responsibility of the states to deal with crime, and he did not believe that federal habeas review was intended to, or should be allowed to, hamper the states in their effective discharge of that difficult responsibility. *Brown v. Allen*, 344 U.S. at 510-11. He viewed the Habeas Act of 1867 as enlarging only the *area of claims* that could be reached on habeas, not as enlarging or changing the "historic function" of the writ itself. *Brown v. Allen*, 344 U.S. at 500. This "historic function" is to provide relief in those rare cases where "there are meritorious causes in which habeas corpus is the ultimate and only relief and designed to be such." *Brown v. Allen*, 344 U.S. at 501.

In order to perform its historic function, a federal court cannot be bound by a state court's view of federal constitutional law. A federal court does not adequately perform the task assigned to it by Congress if it allows a state court to have "the last say" when there is the risk that the state court "may have misconceived a federal constitutional right." *Brown v. Allen*, 344 U.S. at 508.

But there is nothing in Justice Frankfurter's view that even remotely suggests that expanding the habeas statute to enable lower federal courts to review state prisoners' claims of unconstitutional restraint was intended to turn federal habeas review of state court convictions into "nothing more than a replay of the direct appeal, as one federal district judge and then three federal appellate judges duplicate the work of the more numerous state judges." *Brecht v. Abrahamson*, 944 F.2d 1363, 1370 (7th Cir. 1991) (J.A. 114). Rather, the "great writ" was intended to be limited to its historic role as a unique and exceptional remedy, the ultimate "safeguard of freedom in the Anglo-American world." *Brown v. Allen*, 344 U.S. at 512. While Justice Frankfurter recognized the importance of the writ, he also recognized that it has as much potential to do evil as it has to do good and that "[a]buse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." *Brown v. Allen*, 344 U.S. at 512.

The potential of the writ to do evil and to threaten the forces of authority that are essential to our society will be realized if the writ is allowed to drift loose from its moorings, if it is regarded as nothing more than yet another round of direct review in which the same stringent test for harmless error that was applied in the state court is simply reapplied by a federal habeas court.

This Court's adherence to both the imperative of federalism and the core purpose of the writ did not end

with the landmark decision of *Brown v. Allen*. It is demonstrated perhaps even more forcefully in *Fay v. Noia*. Although this Court in *Fay v. Noia* viewed the scope of the habeas jurisdiction as very broad, it grounded the perceived need for such broad jurisdiction in the historic function of the writ itself. *Fay v. Noia*, 372 U.S. at 399–426. This Court has since retreated from the broad standard it adopted in *Fay v. Noia* for determining when claims not litigated in state court can be entertained on habeas. *See Wainwright v. Sykes*, 433 U.S. 72; *Coleman v. Thompson*, 111 S. Ct. 2546 (1991). But it has never retracted its strong articulation of the core purpose of the writ.

The Court in *Fay v. Noia* held the function of the writ is to provide a remedy for "whatever society deems to be intolerable restraints," restraints contrary to "the fundamental requirements of law." *Fay v. Noia*, 372 U.S. at 401–02. The function of the writ is to provide relief from restraints "'for a matter for which by law no man ought to be punished'" or for which the court could not determine if there was "'a reasonable ground of imprisonment.'" *Fay v. Noia*, 372 U.S. at 405, quoting *Habeas Corpus* (Bouvier ed., 1856), B 10 (Bacon's Abridgment).

From its inception, the writ was intended to be the remedy for "the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to them constitutionally intolerable." *Fay v. Noia*, 372 U.S. at 414. Although the concept of what proceedings are "fundamentally defective" may change through the centuries, the core purpose of the writ to provide relief only from imprisonment that is "constitutionally intolerable" has not changed and should not change. "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous, but void." *Fay v. Noia*, 372 U.S. at 423.

Habeas provides relief only to those persons "whom society has *grievously* wronged." *Fay v. Noia*, 372 U.S. at 441 (emphasis added). It is because the writ plays only this extraordinary and limited role that its availability in the federal courts to persons in custody pursuant to state convictions "offends no legitimate state interest in the enforcement of criminal justice or procedure." *Fay v. Noia*, 372 U.S. at 440.

It would trivialize this "historic function" of habeas relief to suggest that every state court trial at which a constitutional error was committed, which error the state could not prove harmless beyond a reasonable doubt, constitutes "the kind of criminal proceedings so fundamentally defective as to make imprisonment pursuant to [it] constitutionally intolerable." It is inconsistent with the core purpose of habeas corpus to suggest that "society has grievously wronged" a state prisoner solely because a constitutional error was committed at his state court trial and the state has been unable to meet the stringent burden of proving the error harmless beyond a reasonable doubt. Habeas corpus loses its historic meaning if relief may be granted due simply to the reasonable possibility that the error might have contributed to the verdict.

Yet this would be the result if the *Chapman* test is the standard of harmless error for habeas relief. It would be a result far, far removed from the core purpose of habeas corpus, one which ignores the constitutional imperative of federalism which underlies habeas jurisprudence and forms the cornerstone of the Constitution itself.

Properly construed, habeas review of claims of federal constitutional violations by prisoners in state custody should not interfere with the states' legitimate control of their criminal justice systems. Properly construed, habeas review should not make the habeas court into simply a super-appellate court. Properly construed, habeas review

should not require a remedy for every federal constitutional violation. Properly construed, habeas review should retain its historical purpose of providing relief to state prisoners from a final, presumptively valid state court judgment only in those rare cases where there have been "extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring).

Neither the imperative of federalism nor the core purpose of habeas corpus requires that the *Chapman* test for harmless error apply on habeas review; indeed, they counsel against it.

D. The Nature Of Collateral Review, The Remedial Nature Of The *Chapman* Test, And The Nature Of A *Doyle* Violation Dictate That The *Chapman* Test Not Be Applied On Habeas Review Of A *Doyle* Violation.

1. Different standards are appropriate because of the inherent differences between direct review and collateral review.

Concluding that the *Chapman* test does not apply on habeas review is compelled by the principle that direct review is inherently different from collateral review. Direct review is the primary avenue for review of a conviction and when the process of direct review comes to an end, a presumption of finality and legality attaches to the conviction and sentence. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). The role of habeas corpus, although important in assuring that federal constitutional rights are observed, is secondary and limited; habeas corpus is not a forum to relitigate state trials. *Barefoot v. Estelle*, 463 U.S. at 887. On collateral habeas review, the criminal

defendant is challenging an otherwise final and presumptively valid judgment. *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987).

Until direct review is completed, a state judgment is neither final nor presumptively correct and valid. Because statutory time limits mandate that direct review occur reasonably promptly after conviction, memories of underlying facts are relatively fresh and if either a hearing on contested matters or a retrial thereafter is necessary, evidence is less apt to have lost its probative value. *See, e.g.*, §§ 808.04, 809.30, Wis. Stats. (1989-90). In addition, appellate courts which review cases on direct review do more than review the particular cases before them. Their decisions often establish precedent to guide the trial courts in future cases. In particular, direct review by this Court is essential to enable it to pronounce the final and controlling word on federal law which is conclusive on all other courts. *See Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590, 631-32 (1874). In contrast, the lower federal courts have power on habeas review only to release individual petitioners from state custody; their decisions do not make federal constitutional law which is binding precedent on the state courts. *See generally United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970); *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 296 (1970).

This Court has held on several occasions that the same standards for evaluating and remedying constitutional violations that apply on direct review do not apply on habeas review. In *United States v. Frady*, 456 U.S. 152, 164 (1982), a federal prisoner habeas case, the Court held that it would be inappropriate on collateral review to evaluate an alleged error that had not been raised at trial under the same standard that would be used on direct review. To do so would be to wrongly treat direct review and collateral review as interchangeable. A criminal defendant who has waived or exhausted his right to direct

appeal stands fairly and finally convicted. "Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, the final judgment commands respect." *United States v. Frady*, 456 U.S. at 164–65.

It has long been the law that an error which would justify reversal on direct appeal will not necessarily provide a basis for relief on a collateral attack from a final judgment. *United States v. Frady*, 456 U.S. at 165.

Similarly, in *Teague v. Lane*, 489 U.S. 288, this Court drew upon Justice Harlan's views in prior cases to conclude that because collateral review is an avenue for upsetting an otherwise final and valid conviction, new constitutional rules of criminal procedure should not apply retroactively to cases on collateral review even though they apply retroactively on direct review. The Court held that habeas corpus is not intended to assure every individual a trial free of constitutional error, emphasizing that the interests of finality and federalism are vital in determining the proper scope of habeas corpus review. *Teague v. Lane*, 489 U.S. at 308. *See also Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., separate opinion).

The cost to the criminal justice system of undermining finality of judgments is a legitimate concern whose importance is not limited to the issue of retroactivity. Petitioner and amicus say that this factor is insignificant compared to what they perceive as an overriding need to have a federal court be the arbiter of all federal constitutional rights. But this Court has already rejected that notion. This Court has said that while there may have been reason to distrust the commitment of state court judges to federal constitutional rights at one time in our history, and although there are differences between state and federal institutions, state courts, like federal courts, are constitutionally obligated to safeguard personal

liberties and to uphold federal law, and there is no reason to believe they are incompetent, unwilling, or unable to do so. *Stone v. Powell*, 428 U.S. 465, 493 n.35 (1976). This Court has also rejected the premise that every litigant is entitled to a federal forum on every possible constitutional claim. *Cf. Allen v. McCurry*, 449 U.S. 90 (1980).

Although this Court will not presume that the state courts are unwilling or unable to protect federal constitutional rights, it recognizes that federal habeas jurisdiction has a beneficial deterrent aspect. The Court has noted "'the threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards.'" *Teague v. Lane*, 489 U.S. at 306, quoting *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting).

But this Court has held that any deterrent function the threat of habeas may be said to have is adequately served if the habeas court applies constitutional standards that prevailed when the original proceedings took place; new constitutional standards need not be applied on collateral review. *Teague v. Lane*, 489 U.S. at 306.

This deterrent theme also played a major part in this Court's decision in *Stone v. Powell*, 428 U.S. at 483, 486, where the Court held that the judicially created exclusionary rule is designed to effectuate the individual rights secured by the Fourth Amendment primarily by deterring future police misconduct. The Court also held, however, that this aim is adequately met by applying the exclusionary rule at the trial level and on direct review. *Stone v. Powell*, 428 U.S. at 492–93.

The Court concluded that even if applying and enforcing the exclusionary rule on collateral review might provide some additional deterrence, that benefit "would be

outweighed by the acknowledged costs to other values vital to a rational system of criminal justice." *Stone v. Powell*, 428 U.S. at 494-95. Among these costs is the risk that due simply to the passage of time a criminal defendant, who is entitled only to a new trial, will actually go free because the state can no longer meet its burden of proof at a new trial. *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality opinion). Moreover, there is no assurance that the result of the second trial will be any more accurate than the result of the first trial and the second trial itself presents an opportunity for new errors which may be as bad as, or worse than, those identified at the original trial. *Brecht v. Abrahamson*, J.A. at 121.

The concerns that explain the differences between direct review and collateral review also explain why the *Chapman* test that governs federal constitutional error in all courts on direct review should not apply on habeas review. To apply the same stringent harmless error standard on collateral review that is applied on direct review is to wrongly treat the two as interchangeable. It ignores the principle that an error which may warrant reversal on direct appeal may not warrant relief on collateral attack on a final judgment. *See Frady*, 456 U.S. at 165.

2. The remedial nature of the *Chapman* test and the nature of a *Doyle* violation counsel against applying *Chapman* on habeas review of a *Doyle* violation.

The *Chapman* harmless error rule, like the Fourth Amendment exclusionary rule, is, in essence, a remedial device designed to protect federal constitutional rights in criminal proceedings and to encourage state prosecutors, judges, and officers to fully respect and enforce those rights. In *Chapman*, which came before this Court on

direct review, the Court held that a state conviction need not be reversed on the ground of federal constitutional error if the reviewing court could find the error to be harmless beyond a reasonable doubt. The Court held that every federal constitutional error does not require automatic reversal of a conviction. Instead, it created a harmless error rule sufficient to redress those constitutional infringements that reasonably might have affected the proceedings that produced the conviction. Thus, the *Chapman* harmless error rule sounds in remedy. It is an alternative to the more drastic remedy of automatic reversal. It is not itself a constitutional right, but, like the exclusionary rule, is a device designed to protect constitutional rights.

In practice, the harmless error rule operates like the exclusionary rule. The harmless error rule encourages police, prosecutors, and trial judges to be mindful of constitutional rules by posing the risk that a conviction will be reversed and a new trial ordered unless the state can show that any constitutional error was harmless beyond a reasonable doubt.

The threat of losing a conviction is sufficient at the state court level to encourage adherence to constitutional rules and procedures. It is not reasonable to believe that police, prosecutors, and trial judges will be any more encouraged to obey the Constitution by the threat that even if the state appellate courts do not reverse a conviction due to federal constitutional error, a federal habeas court might do so. Nor is the *Chapman* test necessary at the federal habeas level to encourage state appellate judges to enforce the federal Constitution. There is no reason to believe that state appellate judges would deliberately disregard constitutional rules and procedures or deliberately misapply *Chapman* merely because they know that on habeas review, the federal court will not be applying *Chapman*.

The imbalance between the costs and benefits of applying *Chapman* on habeas review is particularly acute here because of the nature of a *Doyle* violation. *Doyle* prohibits a prosecutor from using a criminal defendant's *Miranda* silence to impeach his trial testimony because it is unfair for the state to breach the implied promise of the *Miranda* warnings assuring the suspect his silence will not be used against him. *Doyle*, 426 U.S. 619; *Greer v. Miller*, 483 U.S. at 763. Like the Fourth Amendment exclusionary rule, this limitation on what evidence the government can use applies regardless of the probative value of the evidence. *See Wainwright v. Greenfield*, 474 U.S. 284, 293 (1986); *see also Fletcher v. Weir*, 455 U.S. 603 (1982); *Jenkins v. Anderson*, 447 U.S. 231 (1980) (pre-arrest and pre-*Miranda* silence are admissible; it is the giving of the implied promise that is gravamen of error).

Post-*Miranda* silence may be consistent or inconsistent with a defendant's subsequent exculpatory trial testimony, depending on whether the silence means merely that the defendant was exercising his right to remain silent or whether the silence means he had not yet had time to concoct an exculpatory story. The probative value of a defendant's silence in a particular case is properly left to the jury. The uncertain probative value of silence as impeaching evidence does not prohibit its admission. Rather, the thrust of *Doyle* is that the government must "play straight with those it prosecutes." *Brecht v. Abrahamson*, J.A. at 113. Thus the *Doyle* rule does not directly relate to the defendant's guilt or innocence. Furthermore, the *Doyle* rule may be characterized as a prophylactic rule, a "buffer" around *Miranda*, which is itself a "buffer" around the self-incrimination clause. *Brecht v. Abrahamson*, J.A. at 117. Both the remedial nature of the *Chapman* test and the nature of a *Doyle*

violation counsel that *Chapman* should not be applied on habeas review of a *Doyle* violation.[6]

E. Neither Due Process Nor The Sixth Amendment Right To Jury Trial Mandates That *Chapman* Be Applied On Habeas Review.

Chapman provides the remedy of reversal of a criminal conviction whenever there is a reasonable possibility that federal constitutional error might have contributed to the conviction. *Chapman* requires reversal when, despite sufficient evidence for conviction that does not include the evidence tainted by constitutional error, an honest, fair

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[6]These theories are discussed more fully in the opinion of the Seventh Circuit Court of Appeals (J.A. 98) and in the amicus briefs. In addition, whether *Miranda* claims should be heard on habeas is pending before this Court in *Withrow v. Williams*, No. 91-1030. If this Court bars review of *Miranda* claims on habeas, that rule should be extended to a *Doyle* violation. The State will not reiterate that discussion here. This rationale provides additional support for the State's argument that *Chapman* should not be applied on habeas review of *Doyle* errors, but it is not crucial to the State's argument. The nature of collateral review, the concerns of federalism, the remedial nature of *Chapman*, and the core purpose of habeas corpus compel the conclusion that *Chapman* is not the proper test on habeas review regardless of the nature of the underlying error. In the next section of the brief, the State suggests alternative tests that should replace *Chapman* on habeas review. Those tests may well be applicable to violations other than *Doyle*, where other evidence or comments are unconstitutionally injected into the trial. However, in the case before it, this Court need only decide whether *Chapman* should be applied on habeas review of *Doyle* errors. It can leave to another day questions of whether *Chapman* should be applied on habeas review of other errors and, if not, what standard should be applied to those errors.

minded jury *might* have acquitted in the absence of the constitutional error. *Chapman*, 386 U.S. at 25-26.

The unarticulated value underlying the test formulated in *Chapman* appears to be the right of a criminal defendant to have a jury, not a reviewing court, decide his guilt or innocence.[7] *Chapman* accommodates the notion that even though the evidence is sufficient to establish guilt beyond a reasonable doubt, the jury retains its historical prerogative of not finding guilt.

The *Chapman* test attempts to determine what influenced the jury by realistically evaluating the nature of the error in the context of a specific case. It culls out the erroneous material to see if the error is so insignificant in light of the entire case or the remaining evidence is so overwhelming that we can safely say the error played no part in the jury's decision and the defendant received the full benefit of his trial by jury.[8]

Realistically, any test of harmless error short of automatic reversal will infringe to some extent on the right to have the jury alone determine guilt or innocence because one can never know with absolute certainty if the erroneous material played a part in the jury's verdict.[9]

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[7]*Chapman* could not have rested explicitly on the Sixth Amendment right to jury trial because it had not yet been held applicable to the states. *See Duncan v. Louisiana*, 391 U.S. 145 (1968).

[8]Contrary to the district court's apparent perception in this case, J.A. at 92-93, overwhelming evidence of guilt is not a prerequisite to a finding of harmless error under *Chapman*, although the *Chapman* test can be met by such a showing. *See Fencl v. Abrahamson*, 841 F.2d 760, 768-69 (7th Cir. 1988).

[9]Brecht's position is not clear. He argues that *Chapman* should apply on habeas review. He seeks reinstatement of the district court's order which granted relief because the untainted

While the *Chapman* test attempts to accommodate the goal of having the jury determine guilt or innocence, that goal is not paramount to all else. Many other aspects of the criminal jury system, which have long been accepted, demonstrate that a preference to have the jury alone decide the facts cannot be absolute if the criminal justice system is to function.

For example, the trial judge decides whether to admit a confession or eyewitness identification at trial even though that decision often depends on assessing the credibility of the witnesses, and even though a decision to admit the evidence may well be dispositive of the verdict at trial. Yet

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evidence was not overwhelming. Thus, he implicitly accepts the overwhelming evidence formulation of the *Chapman* test. But at the same time, he argues that the right to have the jury determine guilt or innocence is crucial and that no reviewing court in hindsight can determine what impact a given error had on any juror. He does not indicate how applying *Chapman* on habeas would obviate these problems. And he cites as authority commentators who have favored the automatic reversal rule over the *Chapman* test because they believe *Chapman*, especially the overwhelming evidence formulation of *Chapman*, permits the reviewing court to usurp the function of the jury. *See* Teitelbaum, Sutton-Barbere and Johnson, *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 Wis. L. Rev. 1147; Field, *Assessing the Harmlessness of Federal Constitutional Error--A Process in Need of a Rationale*, 125 U. of Pa. L. Rev. 15 (1976). Yet, he has never argued that *Chapman* should be rejected and replaced with an automatic reversal rule. Perhaps his point is that since, in his view, if even *Chapman* infringes on the jury function, any lesser test surely will. But that point is not well taken, as the State will demonstrate. Moreover, *Bushell's Case*, on which he relies so heavily, sheds little light on the question presented in this case. It dealt with jurors who were imprisoned for returning a disfavored verdict. It did not speak to the harmless error question.

it has never been held that a defendant has a right to have a jury make this initial credibility determination.

Similarly, barring an influx of extraneous, prejudicial information or outside influence, a jury verdict cannot be impeached on the basis of what occurred during deliberations. This is true even though an impropriety during deliberations might have influenced the verdict and arguably has deprived the defendant of his right to have a jury determine his guilt or innocence based solely on the evidence at trial. The law has long recognized that preserving the privacy of jury deliberations must outweigh an expansive view of the right to a jury trial uninfluenced by any error. *See generally* 3 J. Weinstein & M. Berger, *Weinstein's Evidence*, sec. 606[04] (1992); Fed. R. Evid. 606(b).

Recognition that the *Chapman* test of harmless error seeks to accommodate the goal of trial by jury does not mean that the same test must carry over to habeas review, where other goals assume importance.

The State fully agrees that a stringent test of harmless error for federal constitutional errors is warranted on direct review. Requiring the state reviewing courts and this Court to find constitutional error harmless beyond a reasonable doubt on direct review ensures that individual constitutional rights will be fully respected by state courts and officers. Moreover, by making the *Chapman* test an aspect of direct review of state court convictions, this Court is better able to instruct the state courts on what they must do to protect constitutional rights and it guarantees a uniform method of protecting constitutional rights throughout the nation. Applying the *Chapman* test on direct review fully implements the goal of having the jury reach a decision on the basis of a proper record.

But any additional protection of this goal to be gained by applying the *Chapman* test on habeas review would be minimal, while the costs would most certainly be great.

F. Application Of The *Chapman* Test On Habeas Review Of *Doyle* Violations Is Inconsistent With Congress's Express Policy To Limit Habeas Relief To Only Those State Prisoners In Custody In Violation Of The Constitution.

The State fully agrees that in order for habeas corpus to serve as the guardian of federal constitutional rights contemplated by the habeas statutes, *see Reed v. Ross*, 468 U.S. 1, 10 (1984), a state prisoner must be afforded plenary federal review of the merits of his federal constitutional claim.[10] The federal court does not do the job that Congress has assigned it if it conducts only cursory or deferential review of the threshold question of whether a federal constitutional error occurred in the state criminal proceedings. *See Brown v. Allen*, 344 U.S. at 500-02; *Wright v. West*, 112 S. Ct. 2482, 2495 (1992) (O'Connor, J., concurring).

This does not mean, however, that once the habeas court decides that federal constitutional error occurred, the state prisoner is entitled to the same relief he would have received on direct review in state court. It trivializes the great writ and endangers the delicate balance inherent in

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[10]The language in *Reed* was quoted from *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). But the language quoted from *Mitchum* addressed not § 2254 habeas actions, but § 1983 civil rights actions. In § 1983 actions, unlike § 2254 actions, a state court judgment on the merits of the federal constitutional claim is *res judicata* and the claim cannot be litigated anew in the federal court. *See Allen v. McCurry*, 449 U.S. 90 (1980).

our federal system to turn habeas corpus into simply a rerun of the state appellate process.

More fundamentally still, the question on direct review and the question on habeas review are not the same. The question on direct review is whether the state has proven the constitutional error harmless beyond a reasonable doubt. The question on habeas review is whether the state prisoner is "in custody in violation of the Constitution" of the United States. 28 U.S.C. § 2254(a). Every restraint of liberty pursuant to state criminal proceedings in which a "harmful" federal constitutional error occurred under *Chapman* does not constitute restraint in violation of the Constitution warranting habeas relief.[11] The question on habeas is whether the state prisoner must be released from custody because, despite a final and presumptively valid state conviction, the federal court is convinced that there has been such an extreme malfunction of the state criminal justice system as to render the prisoner's custody "constitutionally intolerable." *Fay v. Noia*, 372 U.S. at 414; *Jackson v. Virginia*, 443 U.S. at 332 n.5 (Stevens, J. concurring).

In conclusion, the nature and core purpose of habeas review, the imperative of federalism, the purpose of the harmless error rule, and the nature of a *Doyle* violation all make it inappropriate to apply the *Chapman* beyond a

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[11]In *Rose v. Lundy*, 455 U.S. 509, 543 n.8 (1982), Justice Stevens notes that the principle that new rules need not apply retroactively on collateral review implicitly acknowledges that there is a class of "harmful" constitutional error that nonetheless does not render the criminal proceeding so fundamentally unfair as to require habeas relief: "In ruling that a constitutional principle is not to be applied retroactively, the Court implicitly suggests that the right is not necessary to ensure the integrity of the underlying judgment; the Court certainly would not allow claims of such magnitude to remain unremedied."

reasonable doubt test for harmless error on habeas review of a *Doyle* violation.

II. HABEAS RELIEF SHOULD BE GRANTED ONLY WHERE THE COURT DETERMINES THERE IS NO CONSTITUTIONALLY VALID BASIS FOR THE STATE CUSTODY.

If this Court agrees with the State that the *Chapman* harmless error rule should not apply to a *Doyle* violation on habeas review, it must then determine what approach should be adopted.

As one option, the Court could require the state to prove the constitutional error harmless, but impose a burden less onerous than the *Chapman* beyond a reasonable doubt standard. The Court could, as the Seventh Circuit Court of Appeals did in this case, adopt the harmless error standard stated in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946), and *United States v. Lane*, 474 U.S. 438, 449 (1986). This test provides that "only an error that exerts substantial influence on the course of the trial and produces actual prejudice to the accused vitiates the judgment." *Brecht v. Abrahamson*, J.A. at 116. This test is familiar to federal courts. Like *Chapman*, it looks at the potential influence of the error on the verdict and thus protects the goal of having the jury decide the question of guilt or innocence on the basis of a proper record. At the same time, it is more consistent with the nature and purpose of habeas review than the stringent *Chapman* test. The *Kotteakos/Lane* standard is sufficient to provide relief to a prisoner who has been genuinely prejudiced by constitutional error occurring at his state court proceedings.

As an alternative, equally sufficient standard, the State proposes a test which incorporates the *Jackson v. Virginia*

sufficiency of the evidence standard as the measure for whether a constitutional error has resulted in the state prisoner being in custody in violation of the Constitution within the meaning of the habeas statute. Under this proposal, the habeas court would first determine *de novo* whether federal constitutional error occurred. If it found such error, it would then review the untainted evidence to determine whether it is sufficient to support the verdict of guilt under the *Jackson v. Virginia* standard. Under *Jackson v. Virginia*, the conviction must be upheld if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. at 319.

This proposal could be criticized as ignoring the prospect that the jury verdict might have been influenced by the error, despite a conclusion that the untainted evidence was sufficient to sustain the conviction. But that criticism is not well founded. Despite its creation of the *Chapman* test for harmless error, this Court has never held that a criminal defendant has a constitutional right to a jury verdict totally uninfluenced by trial error. On direct review the *Chapman* test properly focuses on whether there is a reasonable possibility the error contributed to the conviction, not on what might have been the case absent the error. This focus is appropriate on direct review, where the stringent *Chapman* standard serves a protective, educative, and deterrent function.

But on habeas review, the question is not whether there was trial error that should be remedied. The question is not whether, although the guilty verdict is sustainable on untainted evidence, there nonetheless is a reasonable possibility that a trial error might have influenced it. Rather, the distinctly different question is whether the person is in custody in violation of the Constitution.

The question is not whether "harmful" constitutional error as defined in *Chapman* was committed. The question is whether the entire state criminal proceeding was so fundamentally defective that the resulting custody is constitutionally intolerable. *Fay v. Noia*, 372 U.S. at 414. The question is whether the federal court can say that the custody is the result of "an extreme malfunction" in the state criminal justice system. *Jackson v. Virginia*, 443 U.S. at 332 n.5 (Stevens, J. concurring). The question is whether "an innocent person suffers an unconstitutional loss of liberty." *Stone v. Powell*, 428 U.S. at 491 n.31. The question is whether the prisoner is one "whom society has grievously wronged." *Fay v. Noia*, 372 U.S. at 441. The question is whether the prisoner is in custody "'for a matter for which by law no man ought to be punished'" or whether there is no "'reasonable ground'" for his imprisonment. *Fay v. Noia*, 372 U.S. at 405. The ultimate question, embodied in each of these formulations, is whether the person is in custody in violation of the Constitution within the meaning of the habeas statute.

Surely if the record evidence at trial, excluding the constitutionally tainted material, is sufficient to have enabled a rational jury to find the essential elements of the offense beyond a reasonable doubt, it cannot be said that the person is in custody in violation of the Constitution. Where there is untainted evidence sufficient to prove guilt beyond a reasonable doubt, how can it be said that the entire criminal proceeding was so fundamentally defective that the resulting custody is constitutionally intolerable? How can it be said that there was an extreme malfunction in the state criminal justice system? How can it be said that the procedure created an impermissibly large risk that the innocent will be convicted? How can it be said that an innocent person is suffering an unconstitutional loss of liberty? How can it be said that the person is one whom society has grievously wronged? How can it be said that the person is in custody for a matter for which by law no man ought to be punished, or that there is no reasonable

ground for the imprisonment? It cannot be so said. Where there is a constitutionally valid basis for the custody because the state has produced sufficient untainted evidence to support the verdict of guilt beyond a reasonable doubt, it cannot be said that the state prisoner is in custody in violation of the Constitution.

Under the State's proposal, the habeas court will review the allegation of a *Doyle* violation *de novo* to determine if constitutional error was committed. If it finds no constitutional error, it will, of course, deny relief. If it finds such error, it must nonetheless deny relief if the untainted evidence is sufficient under *Jackson v. Virginia* to support the verdict. This test for whether relief is warranted applies whether or not the state court found federal constitutional error.

As an added protection, to assure that the prisoner received the full benefit of *Chapman* guaranteed to him on direct review, if the state court found error but found it harmless under *Chapman*, the habeas court should also review that determination to make sure that *Chapman* was not applied arbitrarily or unreasonably, "manifesting a purpose to defeat federal constitutional rights." *Chapman*, 386 U.S. at 56 (Harlan, J. dissenting). Only if the federal court so found could it grant relief, even though the untainted evidence is sufficient under *Jackson v. Virginia*.[12]

This proposal is adequate to protect those state prisoners who have been grievously wronged, which is the

[12]The State does not ask the Court to fully adopt Justice Harlan's approach in his *Chapman* dissent, which would have limited review to whether the harmless error test used by the State was consistent with due process and, if so, whether it was nonetheless arbitrarily applied in the particular case. Protection of constitutional rights is best afforded by continuing to apply the *Chapman* test on direct review.

core purpose of habeas, for if the untainted evidence is insufficient to support the conviction, relief will be granted. Thus, the state will be penalized for proving its case by unconstitutional means. The risk that the error will not be found harmless beyond a reasonable doubt on direct review, and the risk that the remaining evidence will not be found sufficient by the federal court, should adequately deter prosecutors and state officers from committing serious errors. This proposal is adequate to make sure that state courts "'toe the constitutional mark,'" *Teague v. Lane*, 489 U.S. at 306–07, and authority cited therein, because the habeas court will reject a state court finding of harmless error if it is evident the state court had a purpose to defeat constitutional rights.

Adoption of either the *Kotteakos/Lane* harmless error standard or the *Jackson v. Virginia*/Harlan proposal would adequately accommodate the concerns of federalism intrinsic to our Constitution, the goal of finality necessary to effective enforcement of the criminal law and the protection of the federal constitutional rights of individual citizens essential to our free society. Adoption of the State's proposal would confine the writ of habeas corpus to its proper and crucial role as the federal safeguard against state criminal proceedings that are so fundamentally defective that the resulting custody is constitutionally intolerable because the state has no valid basis for it.

III. A *DOYLE* VIOLATION DOES NOT WARRANT HABEAS RELIEF UNLESS IT MADE THE TRIAL SO FUNDAMENTALLY UNFAIR AS TO DENY DUE PROCESS.

In the alternative, the State argues that a *Doyle* violation is not a constitutional violation at all, and thus does not warrant habeas relief, unless the habeas petitioner demonstrates that it made the trial so fundamentally unfair as to deny him due process.

In *Doyle*, this Court held that a prosecutor's use of a criminal defendant's post-*Miranda* silence to impeach his trial testimony violates the Due Process Clause of the Fourteenth Amendment because it is fundamentally unfair to allow the state to breach the implied assurance contained in *Miranda* warnings. *Doyle*, 426 U.S. at 618-19; *Wainwright v. Greenfield*, 474 U.S. at 293. *Doyle* came before the Court on direct review and the Court reversed the conviction because the state did not argue harmless error. *Doyle*, 426 U.S. at 619-20.

In *Wainwright v. Greenfield*, this Court affirmed the federal circuit court's grant of a writ of habeas corpus. In a concurrence, then-Justice Rehnquist noted that only a small portion of the prosecutor's closing argument was constitutionally objectionable and that the testimony upon which the argument was based had already come in without objection and therefore was before the jury for its consideration regardless of the prosecutor's summation. *Wainwright v. Greenfield*, 474 U.S. at 301 (Rehnquist, J., concurring). Justice Rehnquist suggested, therefore, that "[t]his fact, together with the brevity of the prosecutor's improper comment, at least suggests that the error was harmless beyond a reasonable doubt." *Id.*, citing *Cupp v. Naughten*, 414 U.S. 141 (1973); and *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). However, because the state did not contest the Court of Appeals' conclusion that any error was not harmless, Justice Rehnquist agreed the judgment should be affirmed. *Id.*

In neither *Doyle* nor *Wainwright v. Greenfield* did the parties brief the question of what standard should be used to determine when a *Doyle* violation warrants reversal of an otherwise valid conviction. In *Greer v. Miller*, the question was briefed and argued but the Court never reached it because it held no *Doyle* violation had occurred. Nonetheless, in a concurring opinion, Justice Stevens did propose that in typical habeas cases:

> *Doyle* errors are not so fundamentally unfair that convictions must be reversed whenever the State cannot bear the heavy burden of proving that the error was harmless beyond a reasonable doubt.

Greer v. Miller, 483 U.S. at 767. Justice Stevens restated the view he had expressed in an earlier opinion, that only those constitutional "errors that are so fundamental that they infect the validity of the underlying judgment itself, or the integrity of the process by which that judgment was obtained" warrant relief on habeas review of an otherwise final and valid state judgment. *Id.*, quoting *Rose v. Lundy*, 455 U.S. at 543-44 (Stevens, J., dissenting).

This approach is particularly appropriate for *Doyle* violations. *Doyle* restricts the means by which a prosecutor may attack the defendant's credibility. The prosecutor may ask about and comment on pre-arrest silence or post-arrest, pre-*Miranda* silence, but he may not ask about or comment on post-*Miranda* silence. This is similar to other line-drawing that limits the prosecutor. For example, the prosecutor can argue to the jury that the evidence shows beyond a reasonable doubt that the defendant intended to kill, but he cannot argue that *he believes* the evidence shows intent to kill beyond a reasonable doubt.

The rules governing prosecutorial conduct necessarily draw thin lines which, not surprisingly, are sometimes crossed. For example, in this case, it was perfectly proper for the prosecutor to impeach Brecht's "accident" testimony at trial both by questions and comments about his failure to seek aid for the victim or to call for help. It was proper for the prosecutor to address evidence that instead of seeking help, Brecht immediately stole the victim's car and drove away; that he lied about his situation to the police officer who came to his aid after he had wrecked the car in a ditch; and that he failed to tell the officer or the man who gave him a ride that there had just been a terrible accident in which his brother-in-law was shot. This

evidence of Brecht's conduct occurred prior to his arrest and prior to *Miranda* warnings. Similarly, it was perfectly proper for the prosecutor to impeach Brecht's "accident" testimony at trial by questions about and comments on his failure to tell the arresting officers that the shooting occurred because the gun went off when he tripped. While this silence was after his arrest, it was prior to *Miranda* warnings. *Doyle* only prohibited the prosecutor in this case from referring to the fact that Brecht remained silent after his initial appearance, when he first received *Miranda* warnings.

In fact, the *Doyle* violation consisted of no more than the fact that in phrasing his impeachment questions and comments, the prosecutor misspoke or was slightly careless and used language which was arguably broad enough to encompass impermissible references to Brecht's post-*Miranda* silence as well as permissible references to his pre-*Miranda* silence.

Thus, a *Doyle* violation is similar to other instances of prosecutorial misconduct where a prosecutor's choice of words may cause him to cross a thin line. Recognizing that in the heat of battle counsel may overstep the rules, that due process is an amorphous concept, and that a prosecutor's conduct is often a response to the tactics of defense counsel, this Court has required the petitioner to make a significant showing before habeas relief is warranted for this type of prosecutorial misconduct at trial. *See United States v. Young*, 470 U.S. 1 (1985); *Donnelly v. DeChristoforo*, 416 U.S. at 646-47. It is not enough that the prosecutor's comments "undoubtedly were improper" or even that they deserve condemnation; the question is whether the comments rendered the trial fundamentally unfair. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986); *Donnelly v. DeChristoforo*, 416 U.S. at 643. The petitioner must show that the prosecutor's misconduct "by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v.*

DeChristoforo, 416 U.S. at 643; *Darden v. Wainwright*, 477 U.S. at 181. In essence this is the standard proffered by Justice Stevens in *Greer* to assess whether a *Doyle* violation warrants relief on habeas review.

Because a *Doyle* violation is really a form of prosecutorial misconduct, no worse than any other prosecutorial impropriety at trial, it should be treated the same way on habeas review. Therefore, a *Doyle* violation should not warrant relief unless the habeas court concludes that by itself it so infected the entire trial with unfairness as to make the resulting conviction a denial of due process. *Donnelly v. DeChristoforo*, 416 U.S. at 643.

The cases of *Donnelly v. DeChristoforo*, *Darden v. Wainwright* and *Cupp v. Naughten* are not perfect analogies because the Court, in these cases, held that the error did not rise to the level of a constitutional violation at all--that is, there was no due process violation unless the error by itself so infected the entire trial as to make the resulting conviction a denial of due process. In *Doyle*, on the other hand, the Court held that it is a due process violation for a prosecutor to impeach a defendant's trial testimony with his post-*Miranda* silence. Thus, to equate a *Doyle* violation with other forms of improper prosecutorial argument, this Court apparently would need to modify its language in *Doyle*. The State asks this Court to hold that a *Doyle* error constitutes a denial of due process warranting habeas relief only if, by itself, it so infects the entire trial with unfairness that the resulting conviction violates due process. *See generally United States ex rel. Miller v. Greer*, 789 F.2d 438, 455 (7th Cir. 1986) (Easterbrook, C.J., dissenting). This approach not only warns prosecutors to follow *Doyle* strictly, but it ensures that an unduly high price is not paid for a prosecutor's slip of the tongue.

The prior due process cases do not explain what the habeas petitioner must show to demonstrate that a trial

error so infected the entire trial as to make the resulting conviction a denial of due process. However, in several contexts the Court has emphasized that the central purpose of a criminal trial is to decide the factual question of guilt or innocence. *Rose v. Clark*, 478 U.S. 570 (1986); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986). The Court has indicated that the measure of a fair trial is whether it is one which can be relied upon as having produced a reliable result. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984), and authority cited therein. This requires the petitioner to show a reasonable probability that, but for the error, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

It would be consistent, then, for this Court to clarify the cases of prosecutorial misconduct (including *Doyle* violations) to mean that a petitioner cannot show a denial of due process (and thus cannot show a constitutional violation) unless he shows a reasonable probability that, but for the error, the result of the proceeding would have been different.

The primary rationale of *Strickland*, which makes it applicable to prosecutorial misconduct cases, is that the core purpose of a fair trial, indeed, the core purpose of due process in criminal proceedings, is to ensure that the adversarial proceeding produces a just and reliable result, one in which there can be confidence. *See Strickland*, 466 U.S. at 686–87, 694.

This rationale fully applies to habeas review, whose core purpose is to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Desist v. United States*, 394 U.S. at 262 (Harlan, J. dissenting), *quoted with approval in Teague v. Lane*, 489 U.S. at 312. If the habeas petitioner cannot show a reasonable probability that, but

for the error, the result of the proceeding would have been different, then it cannot be said that the result of the trial was unreliable, that the trial was unfair, that the resulting conviction is a denial of due process, or that there is an impermissibly large risk an innocent man was convicted.[13]

Moreover, the *Strickland* approach is one with which federal courts are intimately familiar and can readily apply. Indeed, there is a nice symmetry in measuring the errors of both prosecutors and defense counsel by the same test. Putting the burden of proof on the petitioner is consistent with the principle that the habeas petitioner has the burden of proving the facts underlying his claim for relief. *See generally Sumner v. Mata*, 449 U.S. 539 (1981). The petitioner already has the burden to prove his own defense counsel's performance denied him the paramount and fundamental right to effective assistance of counsel. It is surely no less legitimate to put the burden on him to prove that the performance of the prosecutor denied him his due process right to a fair trial. This approach is flexible and well suited for measuring prosecutorial errors, which, like errors of defense counsel, can arise in innumerable contexts. *See Strickland*, 466 U.S. at 689.

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[13]In *Strickland*, this Court held because an ineffective assistance claim is an attack on the fundamental fairness of the proceeding and since fundamental fairness is the central concern of the writ of habeas corpus, no special standards should apply to such claims on habeas. *Strickland*, 466 U.S. at 697. If this Court adopts *Strickland* as the standard for *Doyle* violations on habeas, it need not now decide whether the *Strickland* standard should also be applied on direct review.

Arguably, at least on habeas review, the *Strickland* standard could also be converted from a standard that determines whether there was a constitutional violation to a standard for determining whether relief is warranted for the constitutional violation.

Accordingly, this Court should hold that a *Doyle* error warrants habeas relief only if the petitioner shows that, by itself, the error so infected the entire trial with unfairness that the resulting conviction amounts to a denial of due process. To meet this burden, the petitioner must show a reasonable probability that, but for the error, the result of the proceeding would have been different.[14] Absent this showing, the habeas petitioner is not entitled to relief.[15]

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[14]This raises the question of the relationship between the *Strickland* prejudice test and the prejudice a defaulting petitioner is required to show. In *Sawyer v. Whitley*, 112 S. Ct. 2514 (1992), the Court appeared to equate the prejudice prong of the "cause and prejudice" requirement of a defaulted or successive claim with the prejudice showing required in *Strickland*. If this Court adopts *Strickland* as the test for habeas review of a *Doyle* violation, the defaulting petitioner and the non-defaulting petitioner would still be treated differently because the defaulting petitioner would also have to show cause for his default. Under the *Jackson v. Virginia* proposal, the defaulting petitioner who shows cause might get his *Doyle* claim heard by establishing prejudice under *Strickland*, but he would not get relief unless the remaining untainted evidence was insufficient to support the verdict. If a petitioner shows prejudice under *Strickland*, as a prerequisite to either relief or review, the state probably could not show the error was harmless under either the *Chapman* or *Kotteakos/Lane* test. Finally, the miscarriage of justice or actual innocence standard articulated in *Sawyer v. Whitley* for a petitioner who cannot show "cause" is so high that if a petitioner meets it, it appears none of the standards suggested would enable the state to defeat his claim for habeas relief.

[15]In this case, under any of the standards proposed and even if this Court holds *Chapman* applies, for all the reasons argued in the courts below and found by the Wisconsin Supreme Court, Brecht is not entitled to relief and the judgment should be affirmed. *See Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

CONCLUSION

For the above reasons, the judgment of the Seventh Circuit Court of Appeals should be affirmed.

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